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ILLEGALITY AS AN EXCUSE FOR REFUSAL OF PUBLIC SERVICE.

I.

THE plainest basis for a refusal to render service in a public employment is illegality. Where service of the sort asked is plainly in the face of legal inhibitions, the propriety of the refusal is obvious. And if, in giving the service asked, illegality of any kind would be directly abetted, the case is hardly less plain. Where, however, the matter involved is rather *contra bonos mores* than prohibited by explicit law a doubtful problem arises. And where the illegality alleged is remote from the service requested, a still more difficult question is presented.

II.

Obedience to executive orders constitutes, perhaps, the most obvious head of justification for refusal to serve, although considered at large it is of the same obligation from whatever branch of the government the command proceeds — legislative, judicial or executive. The most striking example of this is that executive action which is on a parity with the governmental action of other departments, examples of which are rather rare in our constitutional law. However, in extraordinary circumstances this proper authority of the executive department is particularly plain; and such political action should receive implicit obedience. Thus military necessity might justify the declaration of an embargo, in which case a steamship line would be obliged to tie up its vessels and refuse further freight. To take one

other prominent example, the military authorities would usually be justified in assuming control of the railroad systems extending into the theatre of war. In such a case it was held that the railroad would have an excuse for refusing to accept food-stuffs tendered it without the transit permit which the military authorities had required should be obtained from them by the shipper.[1] What is true of martial authority within the belligerent's own territory is of course still more clear of military government over conquered territory. Those engaged in any service in that territory are subservient to the orders of the military arm in accepting business. In addition to withholding permission to do business by reason of possible danger to its own interests in either case, the military authorities may order the discontinuance of public service because they need the facilities in their own operations. And even a carrier from a neutral may refuse to accept contraband goods for transportation to one of the belligerent countries or to a blockaded port, if it is unwilling to run the risk of capture by the belligerent.[2] And it may refuse to engage itself in a service which will bring it into collision with the authorities of another nation or any violation of its laws.

It must be obvious that when the refusal to serve is made necessary by such exercise of governmental authority there is an excuse. An interesting case in point is Decker *v.* Atchison, Topeka and Santa Fé Railroad Company.[3] The plaintiff was not given the transportation he demanded upon the morning in question because on the 16th day of September, 1893, the defendant railroad company had prescribed a certain rule for the government of its trains entering the Cherokee Outlet on the day of its opening for settlement, providing that no train should enter said outlet within six hours of 12 o'clock noon of said day. Mr. Justice Scott held this refusal under all these circumstances to be entirely justifiable; he said:

"The opening of the Cherokee Outlet to settlement has gone down into history as a scene and an occasion unequaled by any similar event of modern times. A vast domain was opened to homestead settlement in a day, and more than 100,000 people waited upon the borders for the hour of noon, when they could break forth on a wild rush for either town lots or homestead

[1] Illinois Central R. R. Co. *v.* Phelps, 4 Ill. App. 238 (1879); Illinois Central R. R. Co. *v.* Hornberger, 77 Ill. 457 (1875); Phelps *v.* Illinois Central R. R. Co., 94 Ill. 548, (1880).

[2] See Farmers' Loan & Trust Co. *v.* Northern Pac. R. Co., 112 Fed. 829 (1902).

[3] 3 Okla. 553 (1895).

lands. At the particular point where the trains of the defendant in error were located, thousands thronged to board the first train to enter, and, if possible, gain some advantage and get to the promised land before the awful rush. Had trains gone into the country prior to 12 o'clock, hundreds would have become violators of the law no doubt, and, had the defendant in error permitted those already aboard when the trains arrived at the line to remain in the coaches, those waiting on the line to enter trains according to the order of the Secretary of the Interior and the rules prescribed by the company would have been placed at a disadvantage, and their rights under the law would have been unequal and prejudiced thereby. Yes, this rule was a reasonable one, and, in addition to this, was adopted by defendant in error by order of the Secretary of the Interior; and for this court to hold, or the court below to have held, as a matter of law, that it was an unreasonable rule, would, we think, have been error."[1]

III.

A public service company cannot be required to furnish a service which it is not authorized to perform.[2] Thus it cannot be called upon to render any sort of service which it is not empowered to perform. In a recent case a petitioner sought to have illuminating gas from a company which it had been shown in other litigation had only authority to supply heating gas.[3] Said the Court:

"Obviously, unless the defendant be shown to be exercising a public franchise in the vending of gas for lighting purposes, there is no more ground for injunction shown here than if he had sought one to restrain Peaslee, Gaulbert & Co. from refusing to vend oil to him. But the petition on its face shows that, as to the sale of gas for lighting purposes, the defendant was not only not exercising a public franchise, but was, by the ordinance which permitted it to do business in Louisville at all, expressly forbidden to sell gas for any other than heating purposes. The plaintiff is therefore in the position of asking an injunction requiring the defendant to violate an ordinance of the city."

And in a late case[4] a water company was held justified in preparing to discontinue service, its franchise having expired. The doctrine of the court is thus summarized in the headnote:

[1] The same would be true of transportation asked which would involve disobedience of customs regulations, as landing goods at a port not a port of entry.

[2] People *v.* St. Louis & B. Electric Ry. Co., 122 Ill. App. 422 (1905).

[3] Nairin *v.* Kentucky Heating Co., 27 Ky. Law Rep. 551 (1900).

[4] Wade *v.* Lutcher & M. Lumber Co., 74 Fed. 517 (1896).

"On the expiration of a water company's franchise by limitation, the company's right to operate its plant and use the streets of the city therefor ceased, and with it the right of the city to demand service. But where, after the expiration of a water company's franchise, it continued to operate its plant and render service to the public, it was bound during such period to perform the obligations growing out of such assumed quasi-public service, to the extent that it was required to supply water adequate to its reasonable capacity and at reasonable rates, and to that extent it was subject to the jurisdiction of the courts to enforce its implied undertaking. Where a water company, after the termination of its franchise, continued to furnish water, it did so according to a quasi-contractual relation, which was a mere license from which either it or the city could withdraw at will. But a water company continuing to furnish water after the termination of its franchise is subject to regulation by the state or the municipality."

IV.

There is much force in this reiterated distinction. A logging corporation operating a private railway cannot be called upon to take passengers,[1] although if it does so generally, it might be held liable as a common carrier to particular passengers actually accepted, notwithstanding the *ultra vires*.[2] Perhaps the plainest case of this general justification is that one where an irrigation company[3] of which the service was asked, was under an injunction ordering it not to render such service. Plainly in such case it is a good defense that compliance with the request will involve it in contempt of court. But it is almost equally plain that common-law process should be respected.[4]

Wherever there is a statute directly applying to the service in question and expressly stating the conditions under which alone service can be given, there is of course a resulting excuse whenever a

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[1] Laighton *v.* Carthage, 175 Fed. 147 (1910).

[2] Albion Lumber Co. *v.* De Norbra, 72 Fed. 739 (1896).

[3] Sample *v.* Fresno F. & Irrigation Co., 129 Cal. 222 (1900). See *accord*, Nairin *v.* Kentucky Heating Co., 27 Ky. Law Rep. 551 (1900).

[4] Brunswick & W. R. Co. *v.* Ponder, 117 Ga. 63 (1903); Indiana, I. & I. Ry. Co. *v.* Doremeyer, 20 Ind. App. 605 (1898); Landa, Holck & Co., *et al.*, *v.* Missouri, K. & T. Ry. Co., 129 Mo. 663 (1895); Bliven *v.* Hudson R. R. Co., 35 Barb. (N. Y.) 188 (1861). See also Mitchell *v.* Kansas City C. & S. Ry. Co., 116 Mo. App. 116 (1906).

service is asked which comes within its prohibitions. Several examples may be drawn from federal statutes where the number of passengers which a vessel may carry is regulated under the provisions of a statute; the carrier would of course have an excuse for not accepting additional passengers who offer themselves after the vessel has its complement.[1] So if it is illegal for a railroad to let its cars stand in the street it can refuse to permit goods to be loaded upon that part of a spur which is laid through a street without liability for discrimination in so refusing.[2] Where an explicit ordinance of the Board of Health forbids the transportation of corpses except when accompanied by a person in charge having a transit permit containing specified information, a railroad may refuse transportation when all of this information is not filled in.[3] But where a local ordinance forbade an express company to bring liquors and the carrier accordingly refused to act, the ordinance being held invalid, the carrier was held liable, as he must make out his defense at his peril.[4]

V.

Where the service in question is forbidden on Sunday either by a general statute applying to all business, or by a specific statute dealing with the particular business, there is of course an excuse as a consequence. Thus a carrier may refuse to carry on Sunday[5] and need not be prepared to carry even when necessity or charity is involved, so long as any statutory prohibition which applies to him remains.[6] If there is no statutory prohibition, the cases hold that it does not follow that the carrier is bound to transact business on that day unless he chooses to do so.[7] The situation is the same as to holidays other than Sunday.[8]

But if he holds himself out to the public as so doing, and actually

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[1] See Schwerin *v.* North Pac. C. R. Co., 36 Fed. 710 (1888).

[2] Louisville & N. R. R. Co. *v.* Pittsburg & K. Coal Co., 111 Ky. 960 (1901).

[3] Lake Erie & W. R. R. Co. *v.* James, 10 Ind. App. 550 (1894).

[4] Southern Express Co. *v.* Rose Co., 124 Ga. 581 (1905).

[5] Walsh *v.* Chicago, M. & St. P. Ry. Co., 42 Wis. 23 (1877). As to the constitutionality of forbidding service on Sunday, see Hennington *v.* Georgia, 163 U. S. 299 (1896).

[6] Horton *v.* Norwalk Tramway Co., 66 Conn. 272 (1895).

[7] Merchants' Wharfboat Assoc. *v.* Wood, 64 Miss. 661 (1887).

[8] Pennsylvania R. R. Co. *v.* Naive, 112 Tenn. 239 (1903).

enters upon business transacted on that day, he cannot shield himself for either misfeasance or non-feasance because it was done or omitted to be done on the Sabbath.[1] Thus it is generally agreed that if a carrier actually accepts general goods on Sunday, he is liable for not forwarding them immediately. A carrier must continue transportation already begun on Sunday. And by a similar principle he must accept goods from a connecting carrier on Sunday.[2]

The law on this point has been elaborately worked out in relation to telegraphing. A telegraph company, if its office be open, must receive on Sunday all messages the handling of which may fairly be said to be a work of necessity or charity.[3] Unless the circumstances have been explained to the operator or the message bears on its face evidence of its special character, it may be refused as may be all commercial or social messages.[4] However, all messages which are actually accepted must be handled with due diligence throughout their course.[5]

As to the other services, there is as yet little authority. Some services, it is generally agreed, should be open to the public on all days: inns[6] and canals[7] are examples to which a citation may be given. And it is most obvious that in certain other callings service should be given regardless of days: gas and electric supply, water and sewerage service, are plain examples of instances where modern necessity overbears the Sunday policy.

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[1] Merchants' Wharfboat Assoc. *v.* Wood, 64 Miss. 661 (1887).

[2] Philadelphia W. & B. R. R. Co. *v.* Lehman, 56 Md. 209 (1881).

[3] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32 (1890); Rogers *v.* Western Union Telegraph Co., 78 Ind. 169 (1881); Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248 (1888); Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 46 (1890); Western Union Telegraph Co. *v.* Eskridge, 7 Ind. App. 208 (1893); Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 26 (1892); Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 599 (1890); Gulf, C. & S. F. Ry. *v.* Levy, 59 Tex. 542 (1883).

[4] Western Union Telegraph Co. *v.* Hutcheson, 91 Ga. 252 (1892); Willingham *v.* Western Union Telegraph Co., 91 Ga. 449 (1893); Western Union Telegraph Co. *v.* Henley, 23 Ind. 14 (1899); Thompson *v.* Western Union Telegraph Co., 32 Mo. App. 191 (1888); Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 599 (1890).

[5] Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 26 (1892).

[6] Rex *v.* Ivens, 7 C. & P. 213 (1835).

[7] McArthur *v.* Green Bay & Miss. Canal Co., 34 Wis. 139 (1874).

VI.

Some difficult problems arise as to the duty of common carriers to transport liquors into prohibition territory. It is certain that if the delivery would involve the carrier in an illegal transaction he may refuse to undertake it. In the leading case on this point, State *v.* Goss,[1] Mr. Justice Rowell said:

"Although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not bound to transport and deliver intoxicating liquor or other commodities, if thereby they would commit an offence or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity, to make themselves agents for others to break the laws of the State."

Where the local legislation specifically forbids the transportation of intoxicating liquor, the carrier can, of course, refuse to accept. Moreover, as one case[2] holds, the carrier has discretionary power to determine whether the liquors offered are intoxicating in the sense of the law. But if the sale only is illegal the carrier cannot refuse to bring the liquors which may be resold illegally.[3] Thus, where the sale of liquor in original packages was lawful in South Carolina, though it was forbidden in any other form, the carrier could not refuse to receive liquor in the original packages for delivery in South Carolina.[4]

Where it is made illegal by statute to transport fish or game, a carrier may refuse to accept such fish or game if acceptance would promote the violation of the statute or impede its administration. But it will not itself be guilty of violating the act if it has in its possession such fish or game which it has received in packages in regular course without reasonable grounds of suspicion.[5] If in obedience to orders of game inspectors or fish wardens, it delivers up such game or fish for seizure, it will have a sufficient excuse; but apparently there is no protection if these officers acted without authority of law.[6]

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[1] 59 Vt. 266 (1886).

[2] Milwaukee M. E. Co. *v.* Chicago, R. I. & P. Ry., 73 Iowa 98 (1887).

[3] Crescent Liquor Co. *v.* Platt, 148 Fed. 894 (1906); Southern Express Co. *v.* State, 107 Ga. 670 (1899); Southern Express Co. *v.* Rose Co., 124 Ga. 581 (1905).

[4] Blumenthal *v.* Southern Ry., 84 Fed. 920 (1898).

[5] State *v.* Swett, 87 Me. 99 (1895).

[6] Merriman *v.* Great Northern Exp. Co., 63 Minn. 543 (1896).

Quarantine regulations duly established by law will excuse a carrier from accepting passengers destined beyond the quarantine barriers, when it is set up against all passengers coming from a certain district to a certain district; or any passengers,association with whom would detain other passengers.[1] And the same is true of live freight or dead freight against which quarantine is legally declared.[2] However, a carrier who knows of the quarantine, and does not disclose it at the time of acceptance, will be liable, unless the quarantine is so notorious that he may assume that it is known.[3] But it is usually provided that under certain conditions certificates may be obtained, in which case the owners should be duly notified.[4] Regulations providing that water shall not be turned on until an officer of the Board of Health is satisfied as to the plumbing arrangements[5] ought to be respected. And so must laws regulating the transportation of corpses.[6]

VII.

Of course one engaged in public employment should refuse to take any action which would make him liable for abetting illegality. Thus, a carrier of passengers could refuse to take upon the train one fleeing from justice, one going upon the train to assault a passenger, or to commit larceny.[7] In an analogous case it was assumed that the carrier might refuse to take a rebel officer going to the front to join his command.[8] But if the carrier does not know of the illegal nature of the request, he is not legally liable to the owner for taking goods according to his *prima facie* duty.[9] However, a railroad company which negligently permitted slaves to be transported without the authority of their owner, was held liable for their value by reason of being concerned in their escape.[10]

Upon similar principles a telegraph company should refuse to

[1] St. Clair *v.* Kansas City M. & B. R. R. Co., 77 Miss. 789 (1900).
[2] Fort Worth & D. C. Ry. Co. *v.* Masterson, 95 Tex. 262 (1902).
[3] St. Clair *v.* Kansas City M. & B. R. R. Co., 76 Miss. 473 (1899).
[4] St. Louis & S. F. R. Co. *v.* Roane, 93 Miss. 7 (1908).
[5] But see Johnson *v.* Belmar, 58 N. J. Eq. 354 (1899).
[6] Lake Erie & W. R. R. Co. *v.* James, 10 Ind. App. 550.
[7] See the *dicta* in Thurston *v.* Union Pac. R. Co. 4 Dill. (U. S.) 321 (1877).
[8] Turner *v.* North Carolina R. R., 63 N. C. 522 (1869).
[9] Jackson *v.* Railway Co., 87 Mo. 422 (1885).
[10] Louisville & N. R. R. Co. *v.* Young, 1 Bush (Ky.) 401 (1866).

transmit messages which would implicate it in illegality.[1] While it is true there can be no discrimination where the business is lawful, no one can be compelled to aid in unlawful undertakings, or is justified in so doing. A telegraph company should refuse to send libelous[2] or obscene[3] messages, or those which clearly indicate the furtherance of an illegal act or the perpetration of some crime. Recently in New York the telephone and telegraph instruments were taken out of "pool rooms" which were used for the purpose of selling bets on horse races.[4] A telegraph company will be liable for transmitting a forged message, knowing it to be such. It is, therefore, its undoubted right to refuse unauthorized messages,[5] since it might thereby become involved in the perpetration of frauds.

VIII.

There are several cases involving prostitution which test these principles. A carrier of passengers cannot refuse to let a prostitute travel on its trains. As the Court sagely said in the leading case:[6]

"The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while traveling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong

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[1] See Gray *v.* Western Union Telegraph Co., 87 Ga. 350 (1891).

[2] See Dominion Telegraph Co. *v.* Silver, 10 Can. Sup. Ct. 238 (1881).

[3] See Archambault *v.* Great North Western Telegraph Co., 14 Quebec 8 (1886).

[4] See Matter of Cullen *v.* New York Telephone Co., 106 N. Y. App. Div. 250 (1905).

[5] Western Union Telegraph Co. *v.* Totten, 141 Fed. 533 (1905); Bank of Havelock *v.* Western Union Telegraph Co., 141 Fed. 522 (1905).

[6] Brown *v.* Memphis & C. R. Co. 5 Fed. 499 (1880); Pullman Palace Car Co. *v.* Bales, 80 Tex. 211 (1891), unless these women notoriously habitually misconduct themselves *en route.* Beeson *v.* Chicago R. I. & Pac. Ry. Co., 62 Iowa 173 (1883); Stevenson *v.* West Seattle Land Co., 22 Wash. 84 (1900).

car. The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men."

In none of the carriers cases is the problem so well worked out as in a recent case,[1] where a telephone company refused to give service to a bawdy house upon general principles thus discussed:

"It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed the court will not, by its mandamus, require that facilities of a public nature be furnished to a house used for that business. For like reason a mandamus will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance."

IX.

What surely may be refused upon general principles is a service which is necessary to the conduct of an illegal business. To confine the discussion to one problem upon which there is much

[1] Godwin *v.* Carolina Tel. & Tel. Co., 136 N. C. 258 (1904). See however Western Union Telgraph Co. *v.* Ferguson, 57 Ind. 495.

authority, it would seem plain that a telegraph company is not obliged to furnish a service necessarily connected with illegal operations. Where the running of a bucket shop is held an illegal business, it is therefore held in most cases that the telegraph company is not bound to furnish it with market reports, either by virtue of its duties as a public servant to serve all customers without discrimination, or even by virtue of any contract which it may have entered into with such a subscriber as this.[1] Thus the regulation of an exchange to prevent such distribution of its quotations has universally been held reasonable. "It is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work," as the United States Supreme Court recently said.[2] Where the business is simply against public policy, the question is more difficult. The cases are somewhat divided as to whether a telegraph company can refuse to handle messages in relation to the sale of options or futures in jurisdictions where the law simply refuses to enforce such contracts as *contra bonos mores*. There are cases [3] which hold that the company is assuming too much in refusing to transmit such message, but by the weight of authority it is justified.[4] These last cases seem to the writer fundamentally right.

In the cases which have just been discussed the service asked might fairly be said directly to promote the illegality. In such cases the policy justifying refusal is sufficiently plain. But when the illegality is remote from the service asked, it has been assumed that the request cannot be refused. Thus, to illustrate this distinction, innkeepers can refuse to harbor an immoral woman who is entertaining her companions in her rooms,[5] but a railroad cannot refuse to transport a prostitute to a new field.[6] To make another dis-

[1] Bryant *v.* Western Union Telegraph Co., 17 Fed. 825 (1883); Sullivan *v.* Postal Tel. Cable Co., 123 Fed. 411 (1903); Western Union Telegraph Co. *v.* State, 165 Ind. 492 (1905); Smith *v.* Western Union Telegraph Co., 84 Ky. 664 (1887); Central S. & G. Exch. *v.* Board of Trade, 196 Ill. 396 (1902); Cain *v.* Western Union Telegraph Co., 18 Cinn. Wk. Bul. 267 (1887); Sterett *v.* Philadelphia Telegraph Co., 18 Wk. St. Cas. (Pa.) 77 (1887).

[2] Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236 (1905); citing with full approval Central Stock & Grain Exchange *v.* Board of Trade, 196 Ill. 396 (1902).

[3] Western Union Telegraph Co. *v.* State, 165 Ind. 492 (1905). And see Western Union Telegraph Co. *v.* Hill, 65 S. W. 1123 (Tex. Civ. App., 1902).

[4] Gist *v.* Telegraph Co., 45 S. C. 344 (1895); Western Union Telegraph Co. *v.* Harper, 15 Tex. Civ. App. 37 (1896).

[5] See Curtis *v.* Murphy, 63 Wis. 4 (1885).

[6] Brown *v.* Memphis & C. R. Co. 4 Fed. 37 (1880).

tinction, it has been held that a carrier could refuse to take money intended for use in the contraband trade,[1] while it might be obliged to transport a bundle of stationery intended by the consignee for use in his business of dealing in futures.[2] This last point is interesting as it shows another aspect of this principle. When the business which will be aided is illegal in a high degree it taints transactions far removed from it, but where the business is simply against public policy, the taint does not even touch collateral transactions. For example, a carrier cannot refuse to accept goods for transportation when it is known that the owner intends to dispose of them on Sunday;[3] but it would seem that a carrier might refuse to bring firearms into a district where mob violence prevailed, although not consigned to known participants.[4]

X.

Again, whatever illegality there may have been previous to the time when the service is requested, should not affect the right to have present service if the illegal conduct has ceased to operate. Thus where a man who had brought a prostitute to an inn remained after the woman had left the inn, and lost his goods, it was held that he might recover from the innkeeper. Even assuming that such misconduct would have barred him while the misconduct continued, the loss here happened after his misconduct ceased, and his previous immorality could not affect his subsequent status as a guest.[5] On the same principle, in a case where it appeared that the defendant was received at the inn on Sunday, and that to reach the inn on that day he had broken the statute which forbade traveling on Sunday, he was held to be a guest nevertheless, since the relationship was established by acts not necessarily connected with traveling on Sunday.[6]

To go to the other extreme, it makes no difference to the right to service that illegal conduct may happen after the service is complete, provided that such conduct will be really independent of the service

[1] Canter *v.* Bennett, 39 Tex. 303 (1873).

[2] See Gray *v.* Western Union Telegraph Co., 87 Ga. 350 (1891).

[3] Waters *v.* Railroad, 110 N. C. 338 (1892).

[4] See Railroad Co. *v.* O'Donnell, 49 Oh. St. 489 (1892).

[5] Lucia *v.* Omel, 46 N. Y. App. Div. 200 (1899), affirmed in 53 N. Y. App. Div. 641 (1900).

[6] Cox *v.* Cook, 14 Allen (Mass.) 165 (1867).

asked. Thus a railroad cannot excuse itself for failure to transport liquor by showing that the consignee may probably resell it in violation of the prohibition law;[1] or that a passenger is likely to get herself into trouble upon her arrival at her destination, it being usual for her to become intoxicated there.[2] This is not so plain upon the authorities as it ought to be. In one early leading case it seems to have been held that a competitor might be refused transportation to a point where he intended to take return passage and then solicit business on board in violation of proper regulations.[3] In a later case[4] much cited, it was said that a passenger who had been banished by the vigilance committee might be refused transportation back to San Francisco, where a violent fate probably awaited him. But there are various factors in each of these cases which may help to explain them away.

XI.

Upon the whole it would seem to be clear that this new law relating to the various matters discussed in this article is being worked out very well, if one may judge it by the closest analogy in established law. The true extent of public duty depends in last analysis upon public policy just as does the real extent of contractual obligations. Whatever policy is strong enough to excuse one from the performance of a contract obligation ought surely to justify one in refusing to perform this common-law obligation.

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[1] Southern Express Co. *v.* State, 107 Ga. 670 (1899).

[2] Stevenson *v.* West Seattle Land & Imp. Co., 22 Wash. 84 (1900).

[3] Jencks *v.* Coleman, 2 Sumn. (U. S.) 221.

[4] Pearson *v.* Duane, 4 Wall. (U. S.) 605 (1866), discussed, 18 L. Ed. 447.